

D.P.U. 89-DS-18

Adjudicatory hearing in the matter of a possible violation of  
General Laws Chapter 82, Section 40, by W.D. Cohen Contracting  
Corporation, Canton, Massachusetts.

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APPEARANCES:      Robert Smallcomb, Engineer  
                      Mario Reid, Compliance Officer  
                      Division of Pipeline Engineering and Safety  
                      100 Cambridge Street  
                      Boston, Massachusetts 02202  
                      FOR: THE DIVISION OF PIPELINE  
                              ENGINEERING AND SAFETY

Steven Anderson, Project Manager  
W.D. Cohen Contracting Corporation  
960 Turnpike Street  
Canton, Massachusetts 02021  
                      PRO SE  
                      Respondent

I. INTRODUCTION

On August 3, 1989, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to W.D. Cohen Contracting Corporation ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on April 19, 1989, at 80 Washington Street, Norwell, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification and failed to exercise reasonable precaution while excavating which caused damage to an underground gas service operated by Bay State Gas Company ("Bay State").

On August 9, 1989, pursuant to 220 C.M.R. § 99.06(1), the Respondent submitted a written response disputing the allegations in the NOPV. In a letter dated December 4, 1989, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing.

On December 8, 1989, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on April 2, 1991, pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Robert Smallcomb, a public utilities engineer with the Department, and Mario Reid, a compliance

officer for the Department, represented the Division. Brant Bollivar, supervisor of maps and records for Bay State, testified for the Division. The Division presented eight exhibits. Steven Anderson, project manager for W.D. Cohen Contracting Corporation, testified on behalf of the Respondent. The Respondent offered two exhibits as evidence. The Department moved all exhibits into evidence.

## II. SUMMARY OF FACTS

The Division received a report of a Dig-Safe violation from Bay State indicating the Respondent did not tender proper notification to an underground utility operator (Exh. Div. 1). The report alleged that on April 19, 1989, the Respondent damaged a one and one quarter-inch plastic gas service during an excavation at 80 Washington Street, Norwell, Massachusetts ( id.). The Respondent's project consisted of installing utilities at depths of up to ten feet and grading the surface area above the utilities (Tr. at 37, 39).

In support of the Division's allegation, that the Respondent failed to tender proper notification and failed to exercise reasonable precautions while excavating, Mr. Reid stated that the Respondent contacted Dig-Safe on March 7, 1989, to request a marking of the excavation site ( id. at 11-14, 39; Exhs. Div. 3, 4). Bay State responded to this Dig-Safe marking request by marking the Washington Street site on March 9, 1989 (Exh.

Div. 4). The Respondent's project was scheduled to commence on March 10, 1989 ( id.; Tr. at 11-14). Mr Reid testified that the gas main damaged by the Respondent had been installed by Bay State on March 22, 1989, approximately two weeks after the marking request (Tr. at 45).

Mr. Smallcomb stated that markings made during installation of the damaged gas main were not regulation Dig-Safe markings (id. at 46). He indicated that these informal markings were likely to be inaccurate since they were not made by Bay State personnel trained to comply with Dig-Safe marking requirements (id.). Mr. Reid testified that the Respondent failed to make a Dig-Safe marking request for the newly installed gas main (id. at 7-8; Exhs. Div. 1-3).

Mr. Reid stated that Bay State, in response to the Respondent's March 7, 1989 request, marked the Washington Street site with paint, stakes, and tape in the trenches (Tr. at 17, 18, 25, 47, 48; Exhs. Div. 3, 4). Mr. Smallcomb and Mr. Bollivar testified that marking tape is utilized in the trenches to warn excavators that they are nearing an underground utility (Tr. at 17, 21, 48). They stated that all other markings required by the Dig-Safe Law do not indicate the depth of underground utilities but only the location of underground utilities in terms of their position beneath the surface ( id.). Mr. Bollivar and Mr. Smallcomb also stated that the placement of marking tape in the

trenches is a mere courtesy done by Bay State and it is not mandated by law ( id.). Finally, Mr. Reid asserted that the Respondent's claim, that the gas main installed by Bay State was too close to the surface, even if true, did not exonerate the Respondent from violating the Dig-Safe Law ( id. at 52-54).

In response to the Division's allegations, the Respondent acknowledged that it did not notify Dig-Safe to request a marking of the new gas line installed on March 22, 1989 because it believed all services had been clearly marked in response to the March 7, 1989 marking request ( id. at 31; Exh. Div. 3). The Respondent asserted that a new Dig-Safe number and markings were unnecessary because the Respondent believed it knew the location and depth of all the services at the excavation site based on the markings and stakes utilized during installation of the new service (Tr. at 27-28, 31). The Respondent testified that the work crews at the site knew the location of the newly installed utilities since they maintained a continuous presence on the site (id. at 27-28) The Respondent indicated that excavation at the Washington Street site was on-going and that the work crews did not leave the site ( id. at 27-28, 31, 56; Exh. Div. 3). Therefore, the Respondent asserted, the six-week old Dig-Safe number was still valid (Tr. at 27-28, 31, 56).

The Respondent claimed that Bay State had installed the new gas main too close to the surface, in light of the proposed

grade, causing the Respondent to damage the gas line (Exh. Div. 3). The Respondent argued that even if it requested a second marking of the site, the new markings would only have indicated the lateral position of the service, which the Respondent asserts it already knew, and not the depth of the service ( id.; Tr. at 31-32, 55, 56). The Respondent stated that Bay State placed warning tape directly on the gas main and, therefore, the warning tape was ineffective in warning excavators of the service depth (Tr. at 30, 32, 56; Exh. Resp. 1). The Respondent testified that Bay State lowered the gas main 26 inches, to a depth of 36 inches, after the Respondent damaged the main (Tr. at 30, 56; Exh. Div. 3).

### III. STANDARD OF REVIEW

G.L. c. 82, § 40, in pertinent part, provides that:

No person shall, except in an emergency, contract for, or make an excavation ... unless at least seventy-two hours ... but not more than thirty days ... before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies ... in or to the city or town where such excavation is to be made.

The Department has consistently found that excavators are responsible for maintaining utility designation markings. Linden Construction Co., D.P.U. 87-DS-149 (1991). The responsibility attaches after the utility companies have marked the location of their underground facilities at the excavation site named in the Dig-Safe request. Warner Bros., Inc., D.P.U. 87-DS-124 (1990).

With regard to the issue of reasonable precaution, G.L. c. 82, § 40, in pertinent part, states that:

Any ... excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, main, wires or conduits in use under the surface ... [of] privately owned land, including ... penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc. v. Bay State Gas Co., D.P.U. 89-DS-15 (1990); Petricca Construction Co. v. Berkshire Gas Co., D.P.U. 88-DS-31 (1990); John Mahoney Construction Co. v. Boston Gas Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc. v. Berkshire Gas Co., D.P.U. 87-DS-54 (1990). In Fed. Corp., however, hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp. v. Commonwealth Gas Co., D.P.U. 91-DS-2 (1992). Further, in situations where markings are clear, it is the excavator's responsibility to be cognizant of the risks in excavating and to

adopt an excavating method that is reasonable given the circumstances. John Mahoney Construction Co. v. Boston Gas Co., D.P.U. 88-DS-45 (1990).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for failing to exercise reasonable precaution, adequate support or evidence must accompany the allegation. New England Excavating v. Commonwealth Gas Co., D.P.U. 89-DS-116, at 9 (1993); Fed. Corp. v. Commonwealth Electric Co., D.P.U. 89-DS-2, at 5-6 (1992). In addition, the mere fact that a utility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Co., 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precaution without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro v. Boston Gas Co., D.P.U. 91-DS-4 (1992); Fed. Corp. v. Commonwealth Electric Co., D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc. v. Colonial Gas Co., D.P.U. 88-DS-7 (1990).

#### IV. ANALYSIS AND FINDINGS

The Department must determine if the Respondent failed to tender proper notification and failed to take reasonable precautions to avoid damage to an underground utility. With

respect to the first issue, prior to commencing excavation, the Respondent notified Dig-Safe on March 7, 1989, to mark the proposed excavation site. Bay State responded and marked the site on March 9, 1989, as required by the Dig-Safe Law. On March 22, 1989, however, the character of the site changed when Bay State installed a new gas service after the Respondent's original Dig-Safe request. The Respondent acknowledges that work crews for the Respondent's company were aware of the new gas service installation by Bay State. Although the Respondent contends that markings from the installation were visible, these markings were not made by Company personnel trained to comply with Dig-Safe marking requirements. The Dig-Safe Law was enacted in order to prevent persons unauthorized to mark sites from doing so, in order that the excavator will not erroneously rely on markings which may be incorrect. See Construction Solutions, Inc., D.P.U. 89-DS-17, at 5-6 (1993).

The Department finds that the Respondent should have requested a new marking in order to obtain accurate and reliable markings concerning the installation of the new gas service at the excavation site. Accordingly, the Department finds that the Respondent's failure to request a new marking of the excavation site constitutes a violation of the Dig-Safe Law.

The Division alleged that the Respondent failed to exercise reasonable precautions during excavation work at the Washington

Street site. The Division did not, however, allege what precautions, if any, the Respondent should have taken to avoid damage to an underground utility. In specific instances where there has been an allegation without demonstrating any precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp. v. Commonwealth Gas Co., D.P.U. 91-DS-2 (1992); Albanese Bros., Inc. v. Colonial Gas Co., D.P.U. 88-DS-7 (1990). The Department has consistently found that adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. <sup>1</sup> The Division did not adequately demonstrate that the Respondent failed to exercise reasonable precaution when excavating at the excavation site and, therefore, the Respondent did not violate the Dig-Safe Law by failing to exercise reasonable precaution.

Accordingly, the Department finds that the Respondent violated the notification provision of the Dig-Safe Law. The Department further finds that where this is the Respondent's

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1 The Supreme Judicial Court of Massachusetts may set aside a decision as prejudiced for further action when that decision is "[u]nsupported by substantial evidence." G.L. c. 30A, § 14(7). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30(A), § 1(6).

first violation of the Dig-Safe Law, a civil penalty of \$200 is justified.<sup>2</sup>

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2 Mr. Smallcomb testified that the \$500 fine assessed in the NOPV was incorrect and that the Respondent should be liable for \$200 since this was the Respondent's first violation of the Dig-Safe Law (Tr. at 56; Exh. Div. 8).

V. ORDER

Accordingly, after due notice, hearing, and consideration,  
the Department

FINDS: That W.D. Cohen Contracting Corporation violated the Dig-Safe Law when it failed to tender proper notification to the operator of an underground utility before excavating at 80 Washington Street, Norwell, Massachusetts, on April 19, 1989; and it is

ORDERED: That W.D. Cohen Contracting Corporation shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities payable to the Commonwealth of Massachusetts, within thirty days of the date of this Order.

By Order of the Department,